Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Ownership Rule	)	MB Docket No. 17-318
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	)	

REPLY COMMENTS OF NEXSTAR BROADCASTING, INC.

Nexstar Broadcasting, Inc. ("Nexstar") hereby submits these reply comments to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking reviewing the Commission's national television audience reach rule.[1] Based on initial comments from Nexstar and others, it is clear that the FCC possesses the authority to modify or eliminate the national cap, and that competitive developments and the public interest amply justify the exercise of that authority to repeal the cap in its entirety.[2]

As Nexstar and others established in their comments, the Communications Act confers authority upon the FCC to take such action and the Administrative Procedure Act ("APA") obligates it to do so; and, contrary to the opinion of several commenters, the 2004 Consolidated

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 17-318, FCC 17-169 (Dec. 18, 2017) ("*NPRM*").

[2] Comments of Nexstar Broadcasting, Inc., MB Docket No. 17-318 (filed Mar. 19, 2018) ("*Nexstar Comments*"); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 17-318 (filed Mar. 19, 2018) ("*Sinclair Comments*"); *see also* Comments of the National Association of Broadcasters, MB Docket No. 17-318 (filed Mar. 19, 2018) ("*NAB Comments*") (demonstrating that the FCC has statutory authority to alter the national cap and arguing that it should be updated to reflect competitive developments).

Appropriations Act ("CAA")[3] did not alter these obligations. Further, those the commenters proposing retention of the cap provide no justification for retaining the cap beyond their unsubstantiated theories that "big is bad," small somehow equates to how well any broadcaster serves its local community, and/or that the national cap remains necessary because the Commission has failed to adopt regulations in unrelated proceedings that other parties deem necessary.

A. The Communications Act Provides the Authority to Modify or Eliminate the Cap.

Nexstar's comments explained that the FCC has the authority and the obligation to eliminate the national cap.[4] Moreover, the Commission determined in 2016 that it possesses the power to modify or eliminate the cap, and courts have confirmed that the APA affirmatively requires the FCC to revise its rules where, as here, changing market conditions eliminate a rule's significant factual basis.[5]

As Nexstar explained, Sections 154(i) and 303(r) of the Communications Act provide the Commission with broad power to make rules necessary "in the execution of its functions" and to carry out the provisions of that Act.[6] These provisions, as the Commission previously determined, give it "statutory authority to revisit its own rules and revise or eliminate them," including the national cap rule, "when it concludes such action is appropriate."[7] The Commission has not just

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[3] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §629, 118 Stat. 3, 99-100 (2004).

[4] *Nexstar Comments* at 6-12; *see also NAB Comments* at 6-10, *Sinclair Comments* at 3-6.

[5] *Nexstar Comments* at 7-8.

[6] *Id.*; *see* 47 C.F.R. §§ 154(i), 330(r); *see also Sinclair Comments* at 3-4.

[7] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213 (2016) ("*UHF Discount Elimination Order*").

relied on these sources of statutory authority to support action with respect to the national cap rule, but has done so to support its media ownership rules more broadly[8] and has received the Supreme Court's explicit blessing to this approach for more than half of a century.[9] The APA, moreover, obligates the FCC to avoid arbitrary and capricious decision-making, which includes a requirement to "reexamine" a regulatory approach "'if a significant factual predicate of a prior decision has been removed.'"[10]

Further, despite the NPRM's explicit request that commenters address relevant sources of statutory authority,[11] not a single commenter arguing that the Commission lacks authority to repeal or modify the cap discussed these provisions in their opening comments. This suggests that they lack any persuasive response to the assertion that the Communications Act and the APA authorize repeal or modification of the national cap rule.

B. The CAA Does Not Prevent the Commission from Modifying or Eliminating the Cap.

Rather than directly addressing the core statutes relevant to the FCC's power to act in this area, commenters opposing changes to the national cap rule rely on the CAA, contending this Act

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[8] *See, e.g.*, *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Second Report and Order, 31 FCC Rcd 9864, 9882 n.122, ¶ 47 n.122 (2016); *see id.* at 10024, ¶ 381.

[9] *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978) (holding that Section 303(r) and Section 4(i) of the Communications Act provide authority for media ownership rules); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202-03 (1956) (same).

[10] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (quoting *WIHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)).

[11] *NPRM*, ¶ 9 & n.35.

stripped the Commission of its statutory authority to eliminate or raise the national cap.[12] But, as Nexstar and others demonstrated in their comments, there is no indication that Congress intended the CAA to remove the Commission's authority to eliminate or modify the national cap rule in a rulemaking outside of the quadrennial review.[13]

Although the CAA directed the Commission to reduce the national cap from 45 percent to 39 percent, the plain terms of the CAA directed the FCC to "modify its rules" rather than substitute a statutory national cap for the Commission's national cap rule.[14] Indeed, Congress used the very same language that it used in 1996 when it directed the Commission to "modify its rules for multiple ownership" by "increasing the national audience reach limitation for television stations to 35 percent."[15] Moreover, in its review of the Commission's 1998 biennial review decision (wherein the Commission examined the national cap rule), the D.C. Circuit found the FCC's

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[12] *See, e.g.*, *Revised Comments of the Attorneys General of the States of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia*, MB Docket No. 17-318, at 5-7 (filed February 27, 2018) ("*State Attorneys General Comments*"); *Comments of Public Interest Commenters*, MB Docket No. 17-318, at 1-3 (filed Mar. 19, 2018) ("*OC, et al. Comments*"); *Comments of The Leadership Conference on Civil and Human Rights*, MB Docket No. 17-318, at 1-2 (filed Mar. 19, 2018) ("*LCCHR Comments*"); *Comments of Newsmax Media, Inc*, MB Docket No. 17-318, at 3 (filed Mar. 19, 2018) ("*Newsmax Comments*"); *Comments of DISH Network, L.L.C.*, MB Docket No. 17-318, at 12-13 (filed Mar. 19, 2018) ("*DISH Comments*"); Comments of Free Press, MB Docket No. 17-318, at 5-7 (filed Mar. 19, 2018) ("*Free Press Comments*"); *Comments of Herndon-Reston Indivisible*, MB Docket No. 17-318, at 1-2 (filed Mar. 19, 2018) ("*HRI Comments*").

[13] *Nexstar Comments* at 8-12; *see NAB Comments* at 8-10; *Sinclair Comments* at 4-6. Even Consumers Union, which opposes repeal or modification of the national cap rule, acknowledges this. *Comments of Consumers Union, The Advocacy Division of Consumer Reports*, MB Docket No. 17-318, at 5-6 (filed Mar. 19, 2018) ("*CU Comments*").

[14] CAA § 629 (directing the Commission to "modify its rules for multiple ownership" in section 202(c)(1)(B) by striking "35 percent" and inserting "39 percent").

[15] *Telecommunications Act of 1996*, Pub. L. No. 104-04, §202(c)(1)(B), 110 Stat. 56, 111 (1996) ("1996 Act") (stating that the Commission "shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations").

refusal to modify the then-existing 35 percent cap arbitrary and capricious.[16] The court also directly addressed whether Congress' instruction to the agency to "modify its rules" precluded the Commission from modifying the national cap, and found that it did not. As the D.C. Circuit explained, "[h]ad Congress wished to insulate the [national cap] Rule from review . . . it need only have enshrined the 35 [percent] cap in the statute itself."[17]

Disregarding the plain statutory language and this history, several commenters contend that the CAA enacted a national cap of 39 percent into statute, thereby precluding the Commission from reexamining the rule.[18] They deem that Congress' entirely separate direction for the Commission to exclude consideration of the national cap from the quadrennial review process equates to such enshrinement.[19] But this fails to answer the question of how the Commission could reasonably conclude that Congress' direction to "modify its rules," which the D.C. Circuit previously determined did not enshrine a particular level for the cap, actually did so.[20] Such a

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[16] *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-44, *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002), *modified on rehearing on other grounds*, *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002).

[17] *Fox*, 293 F.3d at 540.

[18] *DISH Comments* at 3; *State Attorneys General Comments* at 2; *see, e.g.*, *OC, et al. Comments* at 1-2; *HRI Comments* at 1-2.

[19] *LCCHR Comments* at 2; *Free Press Comments* at 5; *Newsmax Comments* at 3; *DISH Comments* at 13.

[20] The State Attorneys General cite several decisions in support of their contention that the CAA set a statutory limit of 39 percent, *see State Attorneys General Comments* at 5 n.13, but none of those decisions involve a Congressional direction that an agency modify its rules. Instead, the cited cases are inapposite because all of them involve situations in which Congress set forth a particular standard or rule for an agency to follow, in some instances removing agency discretion that had previously existed. *See Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 168–69 (2d Cir. 2006) (finding that a statute specifying the use of a sixty-two percent base rate for certain categories of medical treatment "removed the . . . discretion" of the Secretary of the Department of Health and Human Services to specify a rate which under a previous version of the statute was required to be "estimated by the Secretary from time to time") (applying 42 U.S.C. §

conclusion is not only contrary to precedent, but also conflicts with basic principles of statutory construction.[21] It is also unsupported by the legislative history.[22] It is settled that "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators," and that statements by individuals "rank among the least illuminating forms of legislative

1395ww(d)(3)(E)(ii)); *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158, 1164 (10th Cir. 2004) (noting that a subsequent statute removed agency discretion because the new statute "specifically detail[ed] within its text" the new test for the agency to follow when calculating Federal Impact Aid) (applying 20 U.S.C. § 7709), *vacated on other grounds*, 437 F.3d 1289, 1163–64 (10th Cir. 2006); *Admin. of the State of Ariz. v. EPA*, 151 F.3d 1205, 1211 (9th Cir. 1998) (observing that a statute providing that "[t]he Administrator may disapprove the redesignation of any area only if he finds, after notice and an opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section" clearly "restricted [the agency's] scope of review") (quoting 42 U.S.C. § 7474(b)(2)); *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 154–58 (D.C. Cir. 1990) (finding that a statute providing that agency "shall . . . promulgate" "regulations or guidance [that] shall establish instructional requirements" removed the agency's discretion to rely to voluntary compliance with a "model training code" and instead required adoption of a "mandatory regime") (applying 42 U.S.C. § 10226). Far from supporting the State Attorneys' General position, these cases demonstrate that Congress knows how to explicitly supplant an agency's discretion on a particular issue. The relevant question here is not whether Congress *can* supplant agency discretion, but whether it actually did so. *See Nexstar Comments* at 10 & nn. 32-33.

[21] *See id.* at 9-11 (demonstrating that (1) Congress knows how to establish statutory requirements for agencies to follow but did not do so here, (2) Congress established such requirements in numerous provisions of the Communications Act itself and thus its failure to do so here is particularly significant, and (3) where Congress acts against the backdrop of agency and court interpretations, it is presumed to that Congress is aware of the existing interpretations and reasonable to assume that, had it intended a different result, it would have chosen different language); *see also NAB Comments* at 8-9.

[22] *See State Attorneys General Comments* at 6.

history."[23] Moreover, because the cited statements are those of lawmakers who opposed the relevant CAA provisions, they are even less persuasive.[24]

On its face, the statutory exemption from the quadrennial review does not change the character of the national cap as a Commission rule. Indeed, equally plausible is that Congress may merely have intended to express that it did not expect the agency to reexamine the rule every four years, and particularly not within the same year as Congress required amendment of the national cap rule to set a 39 percent cap.[25] That is not the same thing as a prohibition on addressing the continued validity of the national cap rule for all time.[26]

C. If the Commission Lacks Authority to Repeal or Modify the National Cap, then it also Lacks Authority to Remove the UHF Discount.

Several commenters argue that the Commission lacks authority to modify the national cap rule while simultaneously contending that the Commission may nonetheless repeal the UHF discount.[27] This argument is even more unpersuasive than the contention that the Commission lacks authority to alter the national cap in general. The plain language of the CAA encompasses

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[23] *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 942 (2017); *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) ("the views of a single legislator, even a bill's sponsor, are not controlling"); *Fox*, 280 F.3d at 1043 (same); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body").

[24] *See Bryan v. U.S.*, 524 U.S. 184, 196 (1998) (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)) ("[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.").

[25] *See NAB Comments* at 10 & n.19.

[26] *Nexstar Comments* at 8-12; *see NAB Comments* at 8-9; *Sinclair Comments* at 4-5.

[27] *See, e.g.*, *State Attorneys General Comments* at 10-14; *HRI Comments* at 5; *OC, et al. Comments* at 2-3; *Newsmax Comments* at 7; *DISH Comments* at 14-15.

"rules relating to the 39 percent national audience reach" cap.[28] The UHF discount is codified within a subsection of the national cap rule.[29] It is therefore properly considered to be a part of the rule itself or, at the very least, a "rule related" to the cap. Thus, if the CAA bars the Commission from modifying the 39 percent cap, that exact same limitation applies equally to the UHF discount. Any other conclusion would be illogical.

D. The Arguments Supporting a National Cap Lack Merit.

As Nexstar demonstrated in its opening comments, a national cap is not needed to protect competition, diversity, or localism, and maintenance of any cap undermines television broadcasters' efforts to innovate to improve the service provided to local viewers.[30] Parties opposing repeal or modification of the national cap rule contend that a cap on national television audience reach is needed to protect the public from harm, but these arguments rest on a distorted view of the world in which the multitudes of non-broadcast competitors are somehow not relevant in today's expansive communications marketplace.[31] They also overlook entirely the FCC's determination thirty-four years ago that a national cap could not be justified based on the agency's competition or diversity goals, and that the tectonic shift that has occurred in the communications industry since that time has made a cap even more unnecessary today.[32] In addition, they ignore the fact that broadcasters must compete for viewers and advertisers with multi-media competitors

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[28] CAA § 629(3).

[29] *See* 47 C.F.R. § 73.3555(e)(2)(i).

[30] *See Nexstar Comments* at 12-25; *see also NAB Comments* at 11-22; *Sinclair Comments* at 6-17.

[31] *See, e.g.*, Comments of Writers Guild of America West, Inc., MB Docket No. 17-318, at 5-10 (filed Mar. 19, 2018); *Free Press Comments* at 10-11; *Newsmax Comments* at 5-6; *Free Press Comments* at 2-8; *HRI Comments* at 3-4; *CU Comments* at 6-7.

[32] *Nexstar Comments* at 3-5, 12-15.

that dwarf them in size.[33] It would be arbitrary and capricious for the Commission to turn a blind eye to the explosion of sources of news, information, and entertainment that has occurred in the intervening decades in an attempt to justify retention of a national cap today.

In addition, although Nexstar supports efforts to improve the diversity of ownership of broadcast stations, there is no evidence that retaining a national cap would further this goal.[34] Nor can the Commission justify retention of a national cap based upon concerns related to accuracy of information in the "current news environment," as any attempt to do so would raise grave First Amendment concerns.[35]

Several commenters also attempt to insert concerns related to retransmission consent fess into this proceeding.[36] The FCC should reject these requests as a meritless effort to distract. Retransmission consent issues have no place in proceedings concerning the media ownership rules, because those rules are designed to promote competition, localism, and diversity for the public, not to protect MVPDs. Moreover, retransmission consent negotiations are governed by their own

[33] *Id.* at 20. DISH's contention that retention of a national cap is needed to "avoid negotiating imbalances" between itself and broadcasters is particularly absurd, given that DISH's market cap (of $18.2 billion) is approximately 84% larger than Nexstar's (which is $2.97 billion). *See* https://www.bloomberg.com/quote/DISH:US (last visited Apr. 10, 2018); https://www.bloomberg.com/quote/NXST:US (last visited Apr. 10, 2018).

[34] *See LCCHR Comments* at 2-3. Moreover, like retransmission consent, this matter is the subject of a separate Commission proceeding.

[35] *See, e.g.*, *id.* at 3-4; *OC, et al. Comments* at 7-8.

[36] *See. e.g.*, Comments of American Cable Association, MB Docket No. 17-318 (filed Mar. 19, 2018) ("*ACA Comments*"); Comments of NTCA, MB Docket No. 17-318 (filed Mar. 19, 2018); *Free Press Comments* at 11-12; *DISH Comments* at 3-10; *CU Comments* at 3-4, 7-9.

rules, which require "good faith" and prohibit certain specific practices, and which the Commission has considered multiple times in the last decade.[37]

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Nexstar urges the Commission to affirm its statutory authority under the Communications Act and repeal the national cap rule in its entirety. It is imperative for the Commission to permit broadcasters to fairly compete in the vastly fragmented modern video marketplace. Repealing the cap is a critical step toward that goal. Taking this action also will allow broadcasters to find innovative ways to serve audiences, thereby promoting competition, diversity, and localism, and the public interest generally.

[37] 47 C.F.R. § 76.65(a)-(b); *see* 47 U.S.C. § 325(b)(3). In fact, retransmission consent-related matters have been the subject of two separate proceedings, both of which were properly unconnected to any media ownership rule reviews. *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011); *Amendment of the Commission's Rules Related to Retransmission Consent*, Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327 (2015). Concerns regarding the pending Sinclair-Tribune merger also have no place in this proceeding, *see, e.g.*, *ACA Comments* at 2-3, 6, 9; *CU Comments* at 7-8; *DISH Comments*; *Free Press Comments* at 3-4; *HRI Comments* at 2, which the Commission is separately considering, *see* MB Docket No. 17-179.

Respectfully submitted,

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